**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**

**CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO.6247 OF 2006**

Balu @ Vishwanath Hiru Metkari & Ors. ...Petitioners

V/s.

Baban Hiru Metkari & Ors. ...Respondents

Shri.Umesh Mankapure for the Petitioners.
Shri.S.D.Rayrikar for Respondent Nos.1, 2A to 2D.
Shri.A.M. Kulkarni for the Respondent No.5.

**CORAM : A.P. DESHPANDE, J.**

**DATED : 23TH NOVEMBER, 2006.**

**P.C. :-**

1. Petitioners and respondent Nos.1 to 4 were members of the joint family. Respondent No.1 and his mother had filed Regular Civil Suit No.149 of 1986 for partition and separate possession. Said suit was decreed and the shares were determined. The petitioners preferred an appeal against judgment and decree passed by the Trial Court by way of Regular Civil Appeal No.345 of 1992. The first appellate court modified the shares of the respective parties and petitioners were allotted 8/35$^{th}$ shares, so also respondent No.1 was allotted 8/35$^{th}$ shares. This modified judgment and decree

passed by the First Appellate court was sought to be executed by filing Regular Darkhast. Aggrieved by the First Appellate Court's judgment and decree, second appeal was preferred by the present petitioners bearing No.2436/ 2002, wherein shares of the parties were again modified and in stead of 8/35$^{th}$ shares, each of the petitioners were given 99/480$^{th}$ shares, whereas respondent No.1 was allotted 45/192$^{nd}$ shares. It is thus clear that the share of respondent No.l was increased and the share of the petitioners was decreased by the judgment rendered in the second appeal. Regular Darkhast filed by respondent No.1 bearing No.61/2001 concluded in putting the parties in possession of the respective shares. The parties were put in actual possession of the respective shares in the landed property. Needless to state that all formalities such as panchanama etc. was over. After receipt of his share, respondent No.1 executed registered Gift Deed in favour of the respondent No.5 in respect of part of the suit land, which is fallow land. After execution of the Gift Deed the respondent No.5 has leased out the gifted land for the period of 99 years to the State Government on nominal consideration of Rupee One per annum, with a view to

enable the State Government to establish Sports Complex. Work of the Sports Complex is in progress.

2. Under these fact situation present petitioners moved application purported to be U/s.144 of Civil Procedure Code, seeking restitution on the basis of modification of the decree made in second appeal by the High Court. The application moved U/s.144 of the Civil Procedure Code is itself wholly misconceived in as much as petitioners' shares are reduced by modifying the decree passed in second appeal and shares are not increased. As such, modification of the judgment and decree effected in second appeal is to the disadvantage of the present petitioners. It is only when modification of the judgment and decree is to the benefit of some party, it is that party who can make an application seeking restitution and not a party against whose benefit modification has been effected. Plain reading of Section 144 of Civil Procedure Code would reveal that as petitioners are not at all benefited by the modification of decree, they cannot seek restitution. Be it as it may, an interim application moved in the proceedings U/s.144 of Civil Procedure Code, claiming relief against the respondent not to create third party interest or change

the nature of the property, has been rejected by the Trial Court and said order passed by the Trial Court is upheld by the Appellate Court. The orders taking concurrent view are perused. It does not suffer from any infirmity or illegality and no interference is required at the hands of this court under Article 227 of the Constitution of India. There is no merit in the application. The same is dismissed.

**A.P. DESHPANDE, J.**